No. 2425.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FARMERS AND MERCHANTS' BANK, PHOENIX, as Intervener, Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY and SIMS ELY, as Receiver for the ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, and the Intervening Petitioners Who Were Allowed to Intervene in the Cause Entitled CHARLES W. CLARK, Complainant, vs. ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, Defendants, in the Court Below, by the Decree of March 12, 1914.

Appellees.

Reply Brief of Appellant

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Phoenix, Arizona.

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United States Circuit Court of Appeals for the Ninth Circuit.

FARMERS AND MERCHANTS' BANK, PHOENIX, as Intervener, Appellant, vs. ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY and SIMS ELY, as Receiver for the ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, and the Intervening Petitioners Who Were Allowed to Intervene in the CLARK, Complainant, vs. ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, Defendants, in the Court Below, by the Decree of March 12, 1914, Appellees.	REPLY BRIEF OF APPELLANT.

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Appellant's counsel has been served with a brief in behalf of the appellees, J. L. Waring, et al, and a brief by the counsel for the receiver of the Arizona Mutual Savings and Loan Association and Arizona Trust Company and by the counsel for the receiver purporting also

to represent the Arizona Mutual Savings and Loan Association and the Arizona Trust Company. Each of these appellees resist reversal of the order of March 12 and the decree of the same date, although it appears of record that not one of these appellees resisted below the application of the appellant for leave to intervene, which application (R. p 99) resulted in the order of March 12, 1914, denying leave to intervene, from which this appeal is taken. The argument of counsel for Waring and others is that the record before the court is insufficient to enable the court to determine the validity of the decree of February 27, 1913, in the case of Clark vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, because no part of the record in that cause except the decree itself is brought before the court, but that if this court finds the record is sufficient then these appellees seek to avail themselves of the argument made by the respondent in the mandamus proceedings directed against the court below and which is here pending for determination.

In response to this position, we respectfully point out that there is before the court in the record on this appeal the decree of February 27, 1913 (R. p 1-15), the bill or petition in intervention of the appellant (R. p 39-72), the appellant's motion to intervene (R. p 76, 78), the order denying the motion (R. p 98, 99), the decree of March 12, 1914 (R. p 92-98), and the petition and mo-

tion of Waring, et al, from which the decree of March 12, 1914, resulted (R. p 29-38).

What more is necessary to enable this court to review the decree of March 12, 1914, as to this appellant and to review the order of March 12, 1914, dismissing the appellant's bill?

The character of the litigation in which the decree of February 27, 1913, was rendered is set forth in minute detail in the appellant's bill or intervening petition. It appears therefrom and from the final decree of February 27, 1913, that when the court below entered the decree it had jurisdiction over the parties before it and over the subject matter.

What more must appellant show?

Appellant was not a party to the record when the decree of February 27, 1913, was entered. It took no part in the proceedings which culminated in that decree, but it acquired a vested interest and property right in the surplus moneys established by that decree in favor of the Arizona Trust Company by virtue of the recovery by it of a judgment against the Trust Company in a court of competent jurisdiction.

While the appellant invoked the ancillary jurisdiction of the court below by the filing of its bill that jurisdiction proceeds as though the suit were entirely independent of the suit in which it was filed;

After the jurisdiction of the ancillary suit is attached the proceedings are entirely independent of and collateral to the proceedings prior to the final decree in the original case.

But, to avail itself of the decree of February 27, 1913, must the appellant retry that cause before this court as upon an appeal from that decree long after the expiration of the term at which it was entered and long after the expiration of the time to appeal therefrom? We think not.

This appellant has the right to take the decree of February 27, 1913, as it finds it and rely upon its validity as disclosed by the face thereof and by the description of the nature of the litigation (which description is admittedly correct) contained in its bill in intervention.

When the appellant filed its bill below, the decree of February 27, 1913, stood unreversed. The term at which it was entered had long since expired. It was immune from lawful attack by the court which granted it even when presided over by another judge. That decree is now irreversible for error, because no appeal from it was ever allowed or presented. That decree is not before this court now upon appeal.

Consequently, appellant is entitled to rely upon the

undisputable presumption of validity which is accorded to the judgments and decrees of all courts of general original jurisdiction and the decree of February 27, 1913, is entitled here to absolute verity.

But, if the record were deficient because it omits the proceedings upon which it was based, counsel is credibly informed that a full record of the decree and pleadings is before this court in the mandamus proceeding to which these appellees refer. Counsel for the appellees are familiar with these mandamus proceedings and may without embarrassment refer thereto. Consequently, we respectfully ask that any deficiency in this record which the mandamus record supplies may be available to the court in the consideration of this appeal.

But, when counsel for the appellees adopt the argument of the respondent in those proceedings as their brief on this appeal, we find it difficult, if not impossible, to reply to such an argument, because, not being a party to the mandamus proceeding, we have never been served with it and are not familiar with it except as counsel have informally advised us that it is in substance the same argument which counsel for the receiver makes on this appeal, the response to which we now approach.

At the outset, we respectfully challenge the right of the receiver to resist this appeal, in-as-much as no resistance to the application of the appellant was made by any one below, although both defendant companies and

the receiver had due notice of the application (R. p 77, 79).

We challenge the authority of counsel to represent the defendant companies here at all. These companies were represented at the trial by other counsel, whose name was and we believe is still of record below, and we have received no notice of any withdrawal of appearance by such counsel, nor have we had any notice of the appearance of counsel for the receiver as counsel for these two companies. We dispute the right of the same counsel to represent the receiver and the defendant companies as well and we protest against such appearance.

As a judgment creditor of the defendant Trust Company, appellant has the right to expect from the receiver of that company the protection of that company's interest exclusively in its behalf.

Instead of receiving such protection, this same receiver, through its same counsel, is asserting rights inimical to the interest of the defendant Trust Company in supporting the annullment of the decree of February 27, 1913, under which the Trust Company was entitled to receive about $20,000, and is supporting the decree of March 12, 1914, under which the Trust Company is stripped of the last vestige of property for the benefit of stockholders in a Loan Association in which appellant has no interest.

In response to the merits of the argument made by

counsel for the receiver and both defendants, we say that the argument is utterly irrelevant to the issues presented to this court upon this appeal. In reality, it seeks to subject the decree of February 27, 1913, to review here as upon an appeal from that decree. No such appeal exists. The alleged absence of jurisdiction in the court to grant the decree of February 27, 1913, exists in nothing but matters which might have subjected the decree to correction in an appellate court had an appeal been duly prosecuted, but which present no jurisdictional defects whatever.

Besides the generous concession contained on pages 41-44 of this brief renders further argument unnecessary. The concession is

(Page 41) "If the decree of February 27, 1913, is sustained, it will be admitted by appellee that the order denying the right of appellant to intervene is error * *."

(Page 44) "Appellant is by the order made March 12 granted an appeal from the order denying him leave to intervene (Record p 100), although appellant is denied the right to appeal from the judgment because, as we have endeavored to show, it was not a proper party to the original cause. With this statement, we are prepared to admit contentions of appellant contained in its brief, pages 10, 11, 12, 13, 14 and 15 but we do deny that plaintiff has been injured within the scope and purview of the case of Credits Commutation Company vs.

United States, 91 Fed. 573, 177 U. S. 315-316 and other cases cited on page 18 of its brief."

We respectfully refer the court to the pages of our brief to which this concession relates.

It contains the vitals of the appellant's argument, which we are now told is conceded.

It includes our claim that the decree is a nullity and should be reversed. It includes a concession that the decree of February 27, 1913, was and is a final adjudication.

In fact, the concession admits the appellee out of court.

We, therefore, submit that the decree and order appealed from should be reversed with costs.

Respectfully submitted,

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